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IN THE
COURT OF APPEALS OF INDIANA

BRANDON ROGERS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 15A01-0512-CR-573
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DEARBORN SUPERIOR COURT
The Honorable G. Michael Witte, Judge
Cause No. 15D01-0504-FA-1

October 31, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Brandon Rogers appeals his convictions for Class A felony possession of cocaine, Class A felony conspiracy to possess cocaine, and Class D felony conspiracy to maintain a common nuisance. We reverse.

Issues

Rogers raises five issues. We address the dispositive issue, which we restate as whether the trial court properly admitted evidence of Rogers's prior bad acts. We also address the sufficiency of the evidence and the validity of the search warrant in the event the State retries Rogers.

Facts

On April 26, 2005, the Greendale Police Department received information from a confidential informant ("CI") regarding possible methamphetamine-related drug activity at Aaron Getzendanner's house. Officer Kendle Davis performed surveillance of Getzendanner's house and Rogers in an effort to corroborate the CI's tip. Officer Davis obtained a search warrant, and on April 28, 2005, officers of the Greendale Police Department and the Dearborn County Sheriff's Department executed the search warrant.

The officers knocked on the front door of the home and announced themselves. No one responded, and they kicked in the door. The officers moved throughout the house to secure it. Officer Davis kicked in a locked bedroom door and found a man and woman inside the room. Officer Davis kicked in another locked bedroom door. Rogers and Getzendanner were located in that room. Rogers was "on the ground kneeling towards a

trash can on all fours," and Getzendanner was "over near a bed." Tr. p. 70. Officer Davis immediately walked over to the trashcan, looked in, and observed two bags containing a white powder substance. The bags were later determined to contain 3.46 grams and 1.38 grams of cocaine. The officers also found five hundred thirty-three dollars and a ledger in Rogers's right front pocket. A search of the room revealed sandwich bags, baking soda, a small handheld torch, "a fingernail file containing a white residue," two spoons containing a white residue, a digital scale with white residue, two containers with two holes punctured into the bottom "to smoke or ingest narcotics through," and a "metal mesh which is like a steel wool substance that's been burned in a baggie." Id. at 101-02, 104-05. Subsequent testing of the residue indicated the presence of cocaine. Rogers's cell phone also was found in the bedroom.

On April 29, 2005, Rogers was charged with Class A felony possession of cocaine, Class A felony conspiracy to possess cocaine, and Class D felony conspiracy to maintain a common nuisance. Prior to trial, Rogers moved to suppress the evidence obtained during the search of the Getzendanner house based on the alleged invalidity of the search warrant. The trial court denied this motion. A jury convicted Rogers as charged. Rogers now appeals.

Analysis

I. Indiana Evidence Rule 404(b)

Rogers argues that the trial court abused its discretion in admitting Johnny Smith's testimony of Rogers's prior bad acts. The admission of evidence is within the sound discretion of the trial court, and the decision to admit evidence will not be reversed absent

a showing of manifest abuse of discretion. Goldsberry v. State, 821 N.E.2d 447, 452-54 (Ind. Ct. App. 2005). A trial court abuses its discretion if its decision to admit evidence is clearly against the logic and effect of the facts and circumstances before the court. Id. at 454.

Indiana Evidence Rule 404(b) provides, "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ." This rule prevents the State from punishing people for their character. Bassett v. State, 795 N.E.2d 1050, 1053 (Ind. 2003). Evidence of extrinsic offenses poses the danger that the jury will convict a defendant because his or her general character is bad or because he or she has a tendency to commit other crimes. Id.

> To decide whether character evidence is admissible under Rule 404(b), the trial court must: (1) determine whether the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the person's propensity to engage in a wrongful act; and (2) balance the probative value of the evidence against its prejudicial effect pursuant to Ind. Evidence Rule 403.

Id.

At trial Smith testified that on April 27, 2005 he was involved in a burglary. He stated that he committed the burglary to "trade guns for coke, trade the stuff that I was getting for coke." Tr. p. 179. He further testified that he was going to trade with Rogers. Smith went on to testify, however, that Rogers did not agree to trade guns for cocaine and

that Rogers told Smith to call him back later. Smith stated his belief that if Rogers liked the guns Rogers would trade cocaine for them.

Rogers argues that this evidence was admitted only to prove Rogers commits crimes and that Indiana Evidence Rule 404(b) prohibits the use of such evidence to prove guilt. Assuming this evidence was relevant to Rogers's intent to possess or knowledge of the cocaine found in the trashcan in the bedroom of the Getzendanner house, as the State argues, we must also determine whether its probative value is substantially outweighed by the danger of unfair prejudice. See Ind. Evidence Rule 403.

At best, Smith's testimony suggests an agreement between Smith and Rogers to exchange guns for cocaine at some indefinite time. Although this evidence might indicate that at some point Rogers intended to possess cocaine to deliver to Smith in exchange for the guns, Smith's testimony is not highly probative of Roger's intent to possess the cocaine found in the trashcan in Getzendanner's bedroom. Instead, this evidence was offered to show that because Rogers may have agreed to trade guns for cocaine in an entirely unrelated transaction, he must have possessed the cocaine found in the Getzendanner's trashcan. This is the very inference that Indiana Evidence Rule 404(b) prohibits.

Further, the State's argument that the unfair prejudicial effect of Smith's testimony did not substantially outweigh its probative value fails. The State's evidence establishing that Rogers constructively possessed the cocaine found in Getzendanner's trashcan is not overwhelming. As discussed at length below, although the evidence may be sufficient to support a conviction of constructive possession, there is not an abundance of evidence of

Rogers's intent to possess the cocaine. Thus, the probative value of Smith's testimony indicating that Rogers may have been willing to deliver cocaine to him at some point in time was substantially outweighed by danger of unfair prejudice. The trial court abused its discretion in admitting this testimony into evidence.

Further, we cannot conclude, as the State urges, that any error in the admission of this evidence was harmless. "A trial error may not require reversal where its probable impact on the jury, in light of all of the evidence in the case, is sufficiently minor so as not to affect a party's substantial rights." Bassett, 795 N.E.2d at 1054. Because the evidence of Rogers's constructive possession of cocaine was circumstantial and not overwhelming, the admission of Smith's testimony affected Rogers's substantial rights. We believe that Indiana Evidence Rule 404(b) was violated, and the error in the admission of the testimony was not harmless.

II. Sufficiency of the Evidence

Because double jeopardy bars retrial only when there is insufficient evidence to support a conviction, we address Rogers's claim that there is insufficient evidence to support his convictions. See Specht v. State, 838 N.E.2d 1081, 1094 (Ind. Ct. App. 2005), trans. denied. When reviewing a challenge to the sufficiency of evidence, we do not reweigh the evidence or judge the credibility of witnesses. Id. We look only to the probative evidence supporting the judgment and the reasonable inferences from that evidence to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. We will uphold the conviction if there is substantial evidence of probative value to support it. Id.

A. Possession

Rogers first argues that there is insufficient evidence to support his convictions because there is insufficient evidence that he possessed the cocaine. All three convictions are based on Rogers's possession of the cocaine in Getzendanner's house. In addition to the possession charge, for example, the conspiracy to possess cocaine charge was based on Getzendanner's overt act of "knowingly allow[ing] Brandon C. Rogers to unlawfully keep cocaine . . . at his (Getzendanner's) residence." App. p. 8. Similarly, the conspiracy to maintain a common nuisance charge was based on the overt act of Getzendanner "knowingly allow[ing] Brandon C. Rogers to unlawfully keep cocaine . . . at his (Getzendanner's) residence." Id.

Rogers contends the evidence is insufficient to establish that he constructively possessed cocaine found in the trashcan. "A defendant is in the constructive possession of drugs when the State shows that the defendant has both (i) the intent to maintain dominion and control over the drugs and (ii) the capability to maintain dominion and control over the drugs." Gee v. State, 810 N.E.2d 338, 340 (Ind. 2004).

It is undisputed that Rogers was not in exclusive possession of Getzendanner's house or the bedroom in which the cocaine was found. In fact, it appears that Rogers was a visitor or invitee at the Getzendanner home. When applying the intent prong of constructive possession to circumstances where a defendant's possession of the premises on which drugs are found is not exclusive, the inference of intent to maintain dominion and control over the drugs must be supported by additional circumstances pointing to the defendant's knowledge of the controlled substance. Id. at 341.

> Additional circumstances may include: (1) incriminating statements by the defendant; (2) attempted flight or furtive gestures; (3) a drug manufacturing setting; (4) proximity of the defendant to the drugs or weapons; (5) drugs or weapons in plain view; and (6) location of the drugs or weapons in close proximity to items owned by the defendant.

Hardister v. State, 849 N.E.2d 563, 573-74 (Ind. 2006).

In considering the additional factors, there is no indication that Rogers made any incriminating statements to the officers or that he attempted flight or furtive gestures. Further, the State concedes that the bags of cocaine were not in plain view. See Appellee's Br. p. 20. In fact, photographs of the trashcan do not clearly indicate the presence of the cocaine, and another officer testified that the cocaine was found "in the bottom of the trash can." Tr. p. 188. Also, it does not appear that the cocaine was found in close proximity to other items owned by Rogers. The only item of Rogers found in the room was his cell phone. Officer Davis testified that he believed Rogers's and Getzendanner's cell phones were both found on the floor near a chair in the bedroom. There is no indication that Rogers's cell phone was in or near the trashcan.

In terms of Rogers's proximity to the drugs, when Officer Davis entered the ten-foot by twelve-foot bedroom, Rogers was near the door approximately two feet from the trashcan. Rogers was on his hands and knees facing toward the trashcan. Under certain circumstances, a defendant's distance from the contraband alone may be indicative of his or her knowledge of such. Here, however, the small room contained a bed, chair, and dresser. Therefore, Rogers's proximity to the cocaine was based, at least in part, on the size and contents of the room. Further, as we have previously discussed, the cocaine was

not in plain view. Under these circumstances, we cannot conclude that Rogers's two-foot distance from the location of the contraband, in and of itself, is indicative of his knowledge that the cocaine was in the trashcan or his intent to control it.

With regard to the drug manufacturing setting, Rogers argues that there was no evidence of the manufacturing of drugs in the house. The State responds that the items found in the room, including the sandwich bags, baking soda, digital scale, small torch, two plastic bottles with holes punctured into the bottoms, a fingernail file with cocaine residue, two spoons containing cocaine residue, and metal mesh are indicative of a drug manufacturing setting. We agree with the State. Based on the definition of "manufacture," we conclude that the State is not required to produce evidence that a drug is actually being created as Rogers appears to suggest. See Ind. Code § 35-48-1-18 (defining "manufacture" to include any packaging or repackaging of the substance or labeling or relabeling of its container). The items found in the room are indicative of a drug manufacturing setting.

Although, under some circumstances, an invitee's presence at a drug manufacturing setting alone may not be sufficient to establish his or her knowledge or intent to possess contraband found there, under these circumstances, we conclude there is sufficient evidence from which Rogers's intent to possess the cocaine in the trashcan could be inferred. First, the State found $553 in cash in Rogers's pocket. This taken with the ledger also found in Rogers's pocket is a sufficient basis from which the jury could infer that Rogers intended to possess the cocaine found in the trashcan, especially when considering that Officer Davis testified, "as an officer dealing in narcotics [sic] often find

these on persons that deal in narcotics and it's just a form and a way that they keep track of amounts of money that individuals owe them for the sales of narcotics." Tr. p. 88. Further, Getzendanner's name appeared on the ledger four times.

Taking Rogers's proximity to the cocaine along with the drug manufacturing setting, especially the cash and ledger found in Rogers's pocket, we conclude there is sufficient evidence from which a jury could infer that Rogers had knowledge of the cocaine. From that knowledge, Rogers's intent to maintain dominion and control over the cocaine was established.

We now turn to the question of whether Rogers had the capability to maintain dominion and control over the drugs. See Gee, 810 N.E.2d at 340. The State argues that although Rogers did not own or live in the house, he was an invitee and that the jury could reasonably infer that Rogers had "care and control of the cocaine in the house." Appellee's Br. p. 21. The State relies on Allen v. State, 787 N.E.2d 473, 482 (Ind. Ct. App. 2003), trans. denied, in which we observed:

> Control in this sense concerns the defendant's relation to the place where the substance is found: whether the defendant has the power, by way of legal authority or in a practical sense, to control the place where, or the item in which, the substance is found. Proof of a possessory interest in the premises in which the illegal drugs are found is adequate to show the capability to maintain control and dominion over the items in question. A defendant's possessory interest in the premises does not require his actual ownership of the premises. [A] house or apartment used as a residence is controlled by the person who lives in it, and that person may be found in control of any drugs discovered therein, whether he is the owner, tenant, or merely an invitee.

(Alteration in original, quotations and citations omitted).

Rogers responds that a person must be living in the residence to be charged with constructive possession of the drugs found there. Citing Hardister, Rogers urges, "Constructive possession requires proof that the person was something other than a visitor in the home." Appellant's Reply Br. p. 6. In that case, Hardister was a visitor in a duplex apartment and was arrested in the attic of the apartment. Hardister, 849 N.E.2d at 574. A handgun was recovered from the basement of the apartment and a "somewhat concealed" shotgun was recovered from the living room. Id. Our supreme court concluded that in the absence of evidence establishing Hardister's possessory interest in apartment where the guns were found, the State failed to prove that he constructively possessed the weapons. Id.

Generally, the law infers that a party in possession of a premises is capable of exercising dominion and control over all items on the premises. See Gee, 810 N.E.2d at 340-41. We conclude that this is one way in which the State may establish that a defendant had the capability to maintain dominion and control over the contraband, not the exclusive way to show dominion and control, as Rogers appears to argue. We do not believe that the Hardister analysis was intended to limit a showing of constructive possession only to cases in which a defendant has a possessory interest in the premises. Instead, the Hardister court was focusing on the fact that Hardister was arrested in the attic and the weapons were found in the basement and the living room, clearly outside of Hardister's physical control. Thus, Hardister could not have controlled the weapons in a practical sense.

Moreover, where Hardister was seen dumping cocaine down the kitchen sink, our supreme court concluded that his efforts to dispose of cocaine demonstrated his dominion over it. Hardister, 849 N.E.2d at 574. Where more than 300 grams of cocaine was recovered from the kitchen, basement, and bedroom closet as well as from the roof and lawn, the court concluded that the jury could readily have found Hardister's constructive possession of cocaine in excess of three grams beyond a reasonable doubt. Id. Because the possession of cocaine conviction was affirmed, we conclude that our supreme court was not attempting to overrule the line of cases holding that control concerns a defendant's relation to the place where the substance is found, including whether the defendant has the power, by way of legal authority or in a practical sense, to control the place where, or the item in which, the substance is found. See, e.g., Allen, 787 N.E.2d at 482.

Here, Rogers was kneeling toward and was within two feet of the trashcan where the cocaine was found. The jury could have reasonably inferred that in a practical sense Rogers could have controlled the cocaine or intended to exercise dominion over the cocaine. There is sufficient evidence to support Rogers's possession of the cocaine.

B. Conspiracy

Rogers also argues that there is insufficient evidence that Getzendanner and he agreed to possess cocaine and maintain a common nuisance to support the conspiracy charges. Rogers contends, and the State agrees, that there is no evidence of an express agreement between the two to possess cocaine and maintain a common nuisance. Rogers asserts the mere relationship between and association of Getzendanner and him does not

establish a conspiracy. The State argues Getzendanner's possession of the drug paraphernalia found in his bedroom, the presence of cocaine in the trashcan, Rogers's kneeling toward the trashcan, and Rogers's possession of the cash and ledger demonstrate an "intelligent and deliberate agreement . . . ." Appellee's Br. p. 22.

Generally, the State is not required to prove the existence of a formal express agreement to establish that element of a conspiracy charge. Simmons v. State, 828 N.E.2d 449, 454 (Ind. Ct. App. 2005). There is sufficient evidence of an agreement if the minds of the parties meet to bring about an intelligent and deliberate agreement to commit the offense. Id. "The State may prove an agreement by direct or circumstantial evidence." Id. Mere association with an alleged co-conspirator, standing alone, is insufficient to support a conviction for conspiracy. Id.

Here, the evidence of an agreement between Getzendanner and Rogers is certainly not overwhelming. Nevertheless, based on the totality of the circumstances, an agreement to possess cocaine and maintain a common nuisance may inferred by the open and visible drug manufacturing setting and Rogers's constructive possession of the cocaine in Getzendanner's house. Although these convictions might not survive a double jeopardy challenge because, as Rogers alleges, they are all based on the same possession, we conclude there is sufficient evidence of an agreement so as to support the conspiracy convictions.

C. Location Enhancements

Rogers also argues that there is insufficient evidence to support the Class A felony enhancements based on his possession of cocaine with 1000 feet of a public park. See

Ind. Code § 35-48-4-6(b)(3)(B). Rogers concedes that Officer Davis testified that the Getzendanner house was "well within 1,000 feet" of a park. Tr. p. 12. Officer Davis also testified that the Getzendanner property is "immediately adjacent to the park." Id. Pictures taken from the side of the house and admitted into evidence confirm that the property appears to abut a park that includes a basketball goal and a playground area. Rogers argues, however, that the State did not offer "any kind of authenticating testimony" as to how Officer Davis arrived at his measurement. Appellant's Br. p. 20.

Although an exact measurement is preferred, based on Officer Davis's testimony and the photographic evidence confirming the close proximity of the house to the park, we conclude that it is readily apparent that the Getzendanner house was within 1000 feet of the park. Under these limited circumstances, no additional measurements were needed to confirm the proximity of the house to the park.

Rogers also argues that because there is evidence that no children were present when the search warrant was executed, the evidence is insufficient to support these enhancements. Indiana Code Section 35-48-4-16(b) provides:

> It is a defense for a person charged under this chapter with an offense that contains an element listed in subsection (a) that:
>
> > (1) a person was briefly in, on, or within one thousand (1,000) feet of school property, a public park, a family housing complex, or a youth program center; and
> >
> > (2) no person under eighteen (18) years of age at least three (3) years junior to the person was in, on, or within one thousand (1,000) feet of the school property, public park, family housing complex, or youth program center at the time of the offense.

Although this statute may have been available to Rogers as a defense to the enhancements, it does not appear that he argued such before the jury. Even assuming he did, Rogers bore the burden of establishing the elements of this defense. Although Rogers asserts on appeal that there were no children present at the park when the warrant was executed and there is evidence in the record to support this assertion, he makes no argument that he was only briefly within 1,000 feet of the park as is also required by the statute. In fact, during the opening arguments, defense counsel stated, "Rogers stopped over at the house, fell asleep in one of the rooms, woke up the next day by the police department." Tr. p. 63. Rogers's argument that there is insufficient evidence to support the enhancements because of this statute is unavailing.

III. The Validity of the Search Warrant

Because the validity of the search warrant is likely to be an issue should the State decide to retry Rogers, we address this issue. Rogers argues that there was not probable cause to support the issuance of a search warrant. Rogers contends that the CI did not report criminal activity actually occurring in Getzendanner's house, that the CI's statements are "hearsay within hearsay" because the CI reported the information to Officer Peggy Gilb and she reported it Officer Davis, the affiant, that Officer Davis did not corroborate the CI's statements, and that information from another police department regarding the drug activity of Matt Knippenberg, an associate of Rogers and Getzendanner, was stale and not relevant to Getzendanner's house. Appellant's Br. p. 12. In support of his argument, Rogers also points out that no evidence of the manufacturing of methamphetamine was found during the search of the house.

Even if Rogers is correct regarding the lack of probable cause, we agree with the State that the good faith exception applies to this case, and the evidence obtained during the search need not be excluded. The exclusionary rule does not require the suppression of evidence obtained in reliance on a defective search warrant when the police relied on the warrant in objective good faith. Hensley v. State, 778 N.E.2d 484, 488 (Ind. Ct. App. 2002); see also I.C. § 35-37-4-5. "The exclusionary rule is designed to deter police misconduct, and in many cases there is no police illegality to deter." Hensley, 778 N.E.2d at 489 (citing U.S. v. Leon, 468 U.S. 897, 920-21, 104 S.Ct. 3405, 3419 (1984)). In Leon, the Supreme Court adopted the good faith exception to the exclusionary rule, utilizing an objective standard to determine whether evidence is admissible when seized by virtue of a search warrant that was issued by a detached and neutral magistrate but later determined to lack probable cause. State v. Mason, 829 N.E.2d 1010, 1019 (Ind. Ct. App. 2005). The good faith exception, however, does not apply where the warrant is based upon false information knowingly or recklessly supplied by an affiant or if the supporting affidavit is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. Id.

Rogers does not argue that Officer Davis's affidavit knowingly or recklessly contained false information. Further, under these circumstances, we cannot conclude that Officer Davis's affidavit is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. In his April 27, 2005 affidavit, Officer Davis stated that Getzendanner occupied the house at 50 Dorman Avenue and indicated

that in recent weeks he had received information concerning the alleged drug-related activity of Getzendanner, Knippenberg, and Rogers.

Officer Davis also indicated that he had received information from Officer Gilb concerning statement made to her by the CI and that this CI was a reliable source of information because he or she had provided information in the past that had been "useful in advancing criminal cases" and had aided Officer Davis "in gaining criminal convictions in at least one case." App. p. 55. Officer Davis indicated that the CI had been at the Getzendanner house on April 26, 2005, and that he or she had overheard Rogers and Knippenberg complaining to "Getzendanner that they had to go to several stores to get Psuedoephnedrine[,] because the 'dollar store' the management would only allow them to purchase three boxes at a time." Id. The CI also smelled "a strong odor of ether" at the Getzendanner house and observed Knippenberg make several trips carrying items from a van to the basement. Id.

Officer Davis stated that during his routine patrols on the night of April 26, 2005, and morning of April 27, 2005, he observed the van Rogers was driving parked at the Getzendanner house. Officer Davis stated that at 11:30 on April 26, 2005, he had a conversation with Rogers during which Rogers appeared to be intoxicated and very nervous and smelled of marijuana. Rogers also believed that the police were "'after him.'" Id. Officer Davis checked Rogers's criminal history, which included many drug-related convictions. Officer Davis's check of Getzendanner's criminal history also included drug related offenses.

Early on the morning of April 27, 2005, Officer Davis observed that the basement lights at the Getzendanner house remained on and "detected the odor of ether in the area of 50 Dorman Avenue." Id. at 56. Officer Davis stated that pseudophedrine and ether, among other items, are ingredients used to produce methamphetamine. During his patrol, Officer Davis also observed two individuals known to be involved in drug related activity visiting the Getzendanner house.

Officer Davis also stated that on April 13, 2005, the Rising Sun Police Department received a report that Knippenberg had harassed a woman. The woman stated that she had lived with Knippenberg until recently, that Knippenberg commonly possessed illegal drugs and preferred to smoke methamphetamine, that she believed Knippenberg was involved in the manufacture of methamphetamine, and that she had used drugs with Knippenberg when she lived with him.

Even if this information is not sufficient to establish probable cause to support a search warrant for the Getzendanner house, we conclude that the affidavit was not so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. Based on the totality of the circumstances, the officers relied in good faith on the search warrant. The trial court properly admitted evidence collected during the execution of the search warrant.

Conclusion

The trial court improperly admitted Johnny Smith's testimony regarding Smith's offer to trade Rogers guns for cocaine. The admission of this evidence was not harmless and requires the reversal of Rogers's convictions. For purposes of retrial, we conclude

that there is sufficient evidence to support Rogers's convictions and the admission of evidence collected during the execution of the search warrant was proper based on the good faith exception to the exclusionary rule. We reverse.

Reversed.

SULLIVAN, J., and ROBB, J., concur.